

SOLE PRACTITIONER SUCCESSION PLANNING: IT IS TIME TO STOP RECOMMENDING ACTION AND START REQUIRING IT

ERICA L. COOK*

I. INTRODUCTION

For years, professional articles have encouraged lawyers to plan for the possibility of their unexpected death, disability or incapacity.¹ While this recommendation applies to all licensed attorneys, it has particular significance for sole practitioners.² Large firms often have multiple attorneys dedicated to each case, and thus a built-in transition plan in the event of one attorney's death, disability or incapacitation; this is not so for individual practitioners, where clients are dependent upon the actions and plans of a single attorney.³

Small firms face some of the same issues as sole practitioners.⁴ There is a risk, especially in the case of spouses, that partners could face death, disability or incapacitation concurrently. There is also a risk that if small firm partners and associates do not plan ahead together, a surviving attorney will not know how to take over the deceased or incapacitated attorney's work, or may lack the capacity to do so. For purposes of clarity, this article will focus on succession-planning problems and proposed solutions as they pertain to sole practitioners, while recognizing that parts of the discussion will often also apply to individuals in small firms.

Demographic information regarding the large number of sole practitioners and small firm attorneys in the legal community underscores the importance of succession planning. The American Bar Association's (ABA) most recent detailed demographic information is based upon the 1,104,766 attorneys who were licensed in the United States in 2005.⁵ Of those licensed attorneys, seventy-five percent were in private practice, a percentage that has been steadily rising since 1980, when only sixty-eight

* Juris Doctor Candidate, 2015, The Ohio State University Michael E. Moritz College of Law. My deepest thanks to Professor Arthur F. Greenbaum for his encouragement and insights.

¹ Sheila M. Blackford, *It's Never Too Early to Plan, But Frequently Too Late*, 72 OR. ST. B. BULL. 40, 40 (2012).

² Stephen N. Maskaleris & Vivienne K. Cooperman, *What Happens When a Lawyer Dies?*, 7 EXPERIENCE 10, 10 (1997).

³ *Id.* at 11.

⁴ *Id.* at 12.

⁵ AM. BAR ASS'N, *Total National Lawyer Counts 1878-2013* (2013), available at http://www.americanbar.org/content/dam/aba/administrative/market_research/total_national_lawyer_counts_1878_2013.authcheckdam.pdf.

percent of attorneys chose this type of practice.⁶ Of these private practitioners, forty-nine percent were sole practitioners, and another fourteen percent were in small firms of five people or fewer,⁷ meaning that over 406,000 sole practitioners and 116,000 small firm attorneys were representing clients across the United States. If the same percentages applied in 2013, where recent data indicated that 1,268,011 attorneys were licensed to practice, the number of sole practitioners increased to almost 466,000, and small firm attorneys to over 133,000.⁸

Moreover, the median age of lawyers has been rising, from age thirty-nine in 1980 to age forty-nine in 2005.⁹ Thirty-five percent of all practicing attorneys in 2005 were age fifty-five or older.¹⁰ This percentage may be even higher today, as many American workers, lawyers included, have delayed their retirement due to the struggling economy.¹¹ This demographic growth in practicing older lawyers poses a potential for an increased number of competence issues beyond those normally faced within the attorney population.¹²

Attorney demographics and the unique challenges facing individual and small firm practitioners underscore the importance of succession planning. A failure to plan may significantly affect three distinct groups: clients, family members and other attorneys.¹³ According to attorney Steve Crossland, a past president of the Washington State Bar Association,

[c]lients are the biggest losers when a lawyer dies without a plan . . . because there are statutes of limitations, hearing deadlines, and the like that can expire with no retroactive remedy – other than a potential malpractice claim . . . which means that then the deceased lawyer's loved ones may pay the price.¹⁴

Illustrating this effect on clients is a federal case in which an attorney's temporary incapacitation due to physical and mental ailments led to the filing of a client's petition one day past the deadline.¹⁵ In considering whether to equitably toll the deadline, an option when "extraordinary circumstances far beyond the litigant's control . . . prevented timely filing,"

⁶ AM. BAR ASS'N, *Lawyer Demographics* (2013), available at http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer_demographics_2013.authcheckdam.pdf.

⁷ *Id.*

⁸ AM. BAR ASS'N, *supra* note 5.

⁹ AM. BAR ASS'N, *supra* note 6.

¹⁰ *Id.*

¹¹ Susan McRae, *Age-related Competence Problems Can Be Tricky to Recognize, Diagnose*, CAL. B.J., July 2013, available at <http://www.calbarjournal.com/July2013/TopHeadlines/TH6.aspx>.

¹² *Id.*

¹³ Susan A. Berson, *Planning for the Inevitable*, 15 LAW. J. 4, 5 (2013).

¹⁴ *Id.*

¹⁵ See, e.g., *Modrowski v. Mote*, 322 F.3d 965 (7th Cir. 2003).

the United States Court of Appeals for the Seventh Circuit concluded that in such a situation, attorney incapacity is indistinguishable from attorney negligence, which is not grounds for equitably tolling a deadline.¹⁶ Citing the similar opinions of other circuit courts, the court noted “attorney negligence is not extraordinary and clients, even if incarcerated, must vigilantly oversee, and ultimately bear responsibility for, their attorneys’ actions or failures.”¹⁷ Ultimately the details of the attorney’s temporary incapacitation appeared irrelevant to the court, and the precedent was set that attorney incapacity will be treated as attorney negligence, and a missed deadline may irreparably harm the client.

Additional client concerns result when a sole practitioner’s lack of planning produces an inevitable time delay. Clients may lack the financial resources to hire a new attorney while the money deposited with the deceased attorney languishes in probate or waits for a conservatorship hearing in the case of incapacitation.¹⁸ Further, clients have a right to choose their representation, and their permission should be obtained before confidential information is shared with another attorney.¹⁹ If permission has not been granted in advance, a court must appoint an attorney to review client files, which postpones the ability of an attorney to address the client’s needs.²⁰ The appointed attorney will then need time to review and decipher unfamiliar case notes and filing systems, adding to the delay.

The impact felt by family members and other attorneys when a sole practitioner fails to plan is more subtle than that of clients, but just as significant. Family members may be left with confidential files that they do not know how to handle and client questions they cannot answer.²¹ They may be unaware that they need to contact the insurance malpractice carrier in order to continue insurance after the attorney’s death.²² Malpractice lawsuits or judgments against a deceased attorney’s estate could impact the family’s finances.²³ The attorney who steps in to close the practice may not know how to contact clients, transfer files or access accounts.²⁴ If the sole practitioner has been in practice for a long time, there could be thousands of

¹⁶ *Id.* at 967.

¹⁷ *Id.* at 967–68 (internal quotations omitted).

¹⁸ Blackford, *supra* note 1, at 41.

¹⁹ Mark H. Aultman, *What Happens When a Lawyer’s Practice Closes?*, OHIO ST. B. ASS’N (Nov. 15, 2013), <https://www.ohiobar.org/ForPublic/Resources/LawYouCanUse/Pages/LawYouCanUse-179.aspx>.

²⁰ Maskaleris & Cooperman, *supra* note 2, at 13.

²¹ Berson, *supra* note 13, at 6.

²² Mark Bassingthwaite, *Succession Planning Really Isn’t Optional, Particularly for Solos*, ALPS (Oct. 10, 2013), <http://www.alps411.com/blog/managing-your-practice---musings-of-a-risk-manager/succession-planning-really-isnt-optional-particularly-for-solos>.

²³ Berson, *supra* note 13.

²⁴ Amber L. Barber, *President’s Column*, 39 VT. B.J. 5, 5 (2013).

files to review and numerous clients to assist.²⁵ Such a situation also impacts that attorney's ability to focus on his or her own practice.²⁶ As mentioned above, there are also confidentiality concerns for an attorney looking at client files without the express permission of the client.²⁷

A poignant example of these challenges comes from an attorney whose friend, a sole practitioner, learned that her terminal cancer provided her with minimal time to live.²⁸ Even with the sole practitioner's advance notice and ability to complete some last-minute planning, the attorney who stepped in to take over the sole practitioner's bankruptcy cases struggled, stating:

I worked my way through them as quickly as I could, but the sheer volume made it impossible to bring all of them to a current status immediately. Since there was little or no money left to glean and much work to be done, they were hardly attractive commodities, and so parceling them out didn't seem very feasible either . . . but I still needed help because of the emergency nature of so many of her cases.²⁹

The successor attorney discussed the difficulty she faced in tracking down clients and the substantial time and energy she ultimately expended in the entire effort—the equivalent of a second full-time job, lasting several months.³⁰ These challenges resulted even with some advance notice of the sole practitioner's impending death.

A final example illustrates the effect of a sole practitioner's death on all three groups. When sole practitioner Donald Rikli died of a heart attack after forty-three years of legal practice, he left his wife to deal with both the sudden nature of his death and 12,000 legal files that had accumulated over the years.³¹ The lawyer who closed down Rikli's practice, Don Metzger, had to expend substantial effort reviewing these files and locating clients, including approximately 200 clients for whom Rikli had been holding original wills.³² Metzger found the situation overwhelming, stating:

Our biggest concern was that something was being overlooked . . . [Rikli] named me as the custodian of his practice but didn't leave any guidelines. Our first concern related to matters with time limits or deadlines, such as

²⁵ Maskaleris & Cooperman, *supra* note 2, at 10–11.

²⁶ Berson, *supra* note 13, at 6.

²⁷ Aultman, *supra* note 19.

²⁸ Berson, *supra* note 13, at 4–5.

²⁹ *Id.* at 4.

³⁰ *Id.* at 6.

³¹ Maskaleris & Cooperman, *supra* note 2.

³² *Id.* at 11.

estate tax returns, pleadings and other litigation filings. The next step was to notify clients of pending files.³³

Metzger arranged new counsel for Rikli's active clients, many of whom were "shocked and confused . . . even angry that their lawyer died, leaving them without representation."³⁴

While a succession plan cannot eliminate all issues that a client, family member or successor attorney may face, it could significantly alleviate the burdens these individuals experience as a result of the sole practitioner's death, disability or incapacitation. According to attorney William Weston, a former Assistant Executive Director of the Maryland State Bar Association,

[t]he tragedy of the whole thing is that this problem is easy to resolve, and in many respects, it could be a real public service . . . [i]n general, people can't deal with it. They have real trouble dealing with death. But we preach to our clients about having living wills and then a lot of lawyers don't take care of this themselves.³⁵

Although the ABA is aware of the problems posed by a lack of sole practitioner planning, the issue still seeks resolution.³⁶

This Note seeks to demonstrate that succession plans should be a requirement for sole practitioners. Part One outlines the current situation, in which there are succession planning recommendations, but not requirements, and discusses why the current practice is insufficient to address the incidence of lack of planning. Part Two recommends the adoption of succession planning requirements, discussing why the proposed solution is reasonable and how it addresses the problem in a manner that adds a minimal administrative burden. Part Three suggests specific office organization and succession plan details, including best practices as recommended by several state bar associations. Finally, Part Four concludes with a succinct summary.

II. CURRENTLY, SOLE PRACTITIONER SUCCESSION PLANNING SUFFERS FROM A LACK OF INCENTIVE DUE TO NON-ENFORCEMENT

Law is a self-regulated profession.³⁷ Lawyers follow "a comprehensive code of legal ethics in a disciplinary process that is highly reactive, triggered only after someone files a complaint charging a lawyer

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ See, e.g., Blackford, *supra* note 1; Maskaleris & Cooperman, *supra* note 2.

³⁷ Ted Schneyer, *On Further Reflection: How "Professional Self-regulation" Should Promote Compliance with Broad Ethical Duties of Law Firm Management*, 53 ARIZ. L. REV. 577, 578 (2011).

with misconduct . . . [therefore] compliance depends [in part] on the individual lawyer's practice skills and values."³⁸ Succession planning is not a rule within the legal profession's regulatory structure; it is only a recommendation. Part A discusses the recommendation set forth within the ABA's Model Rules of Professional Conduct. Part B outlines the lack of enforcement of the recommendation throughout the United States, due to its non-authoritative nature, while Part C reflects on the resulting lack of incentive to plan ahead.

A. The ABA's Model Rule of Professional Conduct 1.3 Sets Forth an Ethical Basis for Succession Planning

The ABA promulgates the Model Rules of Professional Conduct (MRPC), which nearly all states use as a template for their own comprehensive ethical codes.³⁹ Within the MRPC, Rule 1.3 sets forth that "[a] lawyer shall act with reasonable diligence and promptness in representing a client."⁴⁰ The rule itself is straightforward but provides broad possibilities for application. Thus, Comment [5] provides:

To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action.⁴¹

The rules of professional conduct are often comprehensive in scope but general in their requirements in order to apply broadly to lawyers in all practice areas.⁴² This generality can result in insufficient requirements pertaining to specific issues, such as succession planning. The comments provide specificity, but lack the level of enforceability of the rules. Because the legal profession is self-regulating, other regulatory systems fail to fill all of the gaps. Courts may impose civil or criminal liability on attorneys in instances of malpractice or professional misconduct,⁴³ but in terms of the rules that guide day-to-day practice, the ABA and state and local bar associations have been largely successful at preserving the self-regulation of the practice of law.⁴⁴

³⁸ *Id.* at 577.

³⁹ *Id.* at 580.

⁴⁰ MODEL RULES OF PROF'L CONDUCT R. 1.3 (1983).

⁴¹ *Id.* R. 1.3 cmt. 5.

⁴² Schneyer, *supra* note 37.

⁴³ *Id.* at 578–79 (discussing the use of regulatory systems other than self-regulation in specific instances, including within some federal agencies).

⁴⁴ *Id.* at 580. For instance, the work of the ABA and twenty state and local bar associations led Congress to exclude attorneys from being subjected to certain key

Attorneys consider continued self-regulation important, as it “helps maintain the legal profession’s independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.”⁴⁵ Therefore, the dominant influence shaping the behavior of attorneys are those rules adopted by each individual state, including the rules of professional conduct, along with their manner and frequency of enforcement.

B. There Is a Current Lack of Succession Planning Enforcement—Perhaps Even an Inability to Enforce the Practice—Due to the Non-authoritative Nature of the Comment

While some lawyers will plan ahead and create succession plans, the reality is that unless succession planning is an enforced requirement, many will fail to do so, or will fail to do so in a manner that addresses all aspects thoroughly. A plan that lacks sufficient detail will result in chaos.⁴⁶ Under the current professional conduct rules, as adopted by the states, succession planning is simply a recommendation. According to the ABA CPR Policy Implementation Committee, thirty-nine states and Washington, D.C. have adopted the MRPC with comments, though the precise language used within each state code may vary.⁴⁷ Ten states have adopted the MRPC with no comments.⁴⁸ Without Comment [5] to Rule 1.3, their rule would not even contain a reference to the recommendation of succession planning for sole practitioners. Only California has not adopted the model rules.⁴⁹

Comment [5] is not authoritative in any state.⁵⁰ The jurisdictions that adopted the rules with comments all indicate that the comments are simply guides for interpreting the rules; only the rules themselves are authoritative. Several states even go so far as to affirm that compliance with the comments is not obligatory.⁵¹ Without authoritative incorporation of

provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act.
Id. at 577 n.21.

⁴⁵ MODEL RULES OF PROF’L CONDUCT preamble, cmt. 11 (1983).

⁴⁶ Berson, *supra* note 13.

⁴⁷ See CPR POL’Y IMPLEMENTATION COMM., AM. BAR ASS’N, STATE ADOPTION OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT AND COMMENTS 1–4 (May 23, 2011), <http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/comments.authcheckdam.pdf>.

⁴⁸ *Id.* at 4–5.

⁴⁹ *Id.* at 6. A cursory review of California’s ethics rules uncovered no reference advising attorneys to plan ahead in the event of their death.

⁵⁰ See generally *id.*

⁵¹ See, e.g., *id.* at 2. In Florida “comments, even when they use the term ‘should,’ do not add obligations to the rules but merely provide guidance for practicing in compliance with the rules,” while in Texas, “no disciplinary action may be taken for failure to conform to the Comments.” *Id.* at 4.

Comment [5], however, an attorney does not violate Rule 1.3 until he fails to act with diligence in client representation. As a practical matter, when the issue is the lack of a succession plan, a sanction for violation of Rule 1.3 is only effective in certain situations. A penalty such as a reprimand, suspension or disbarment can guide the behavior of attorneys who plan to continue practicing law. However, it is neither a deterrent nor a punishment when the attorney upon whom it is imposed is dead, or is suffering from a disability or incapacity that results in a permanent inability to continue his legal practice. For these attorneys, the sanction would have no practical effect, and yet they represent precisely the situation in which a succession plan is needed.

C. Lack of Enforcement Means That Attorneys Have a Lack of Incentive to Prepare a Succession Plan

A non-authoritative recommendation, combined with an enforcement mechanism that lacks efficacy, means that beyond the general obligation for attorneys to act in an ethical manner, there is little specific incentive for lawyers to prepare a proper succession plan. A sole practitioner who temporarily shut down his practice noted this lack of incentive among attorneys, but suggested that protection of self and family may provide motivation:

Although a terminal situation is often emphasized as the compelling reason to develop emergency procedures, it is the weakest actual motivator . . . most people will procrastinate putting in place a plan to protect clients, but many will have serious interest in a plan that protects their immediate family and themselves. For the solo lawyer, the goals are much the same, and the protections put in place will often cover all the goals simultaneously.⁵²

Rule 1.3 of the MRPC cross-references Rule 28 of the ABA's Model Rules for Lawyer Disciplinary Enforcement, which provides courts with guidance when a succession plan is not made, but much like the enforcement of Rule 1.3, it is a reactive exercise that fails to incentivize proactive succession planning:

If a respondent has been transferred to disability inactive status, or has disappeared or died, or has been suspended or disbarred and there is evidence that he or she has not complied with Rule 27, and no partner, executor or other responsible party capable of conducting the respondent's affairs is known to exist, the presiding judge in the judicial district in which the respondent maintained a practice, upon

⁵² Lloyd D. Cohen, *How My Emergency Plan Saved My Practice*, GPSOLO 34, July–Aug. 2012, at 34, 36.

proper proof of the fact, shall appoint a lawyer or lawyers to inventory the files of the respondent, and to take such action as seems indicated to protect the interests of the respondent and his or her clients.⁵³

The commentary to this Rule indicates an obligation to protect clients in situations in which their lawyer is not available to protect them. Rule 27, which it cross referenced within the rule, provides administrative requirements that would ease transition. Unfortunately, compliance is not possible for an attorney who dies without warning, and it may be difficult in those cases of disability or incapacitation that would be severe enough to warrant closing a practice.

Some lawyers have no plan to retire and believe they can put off succession planning.⁵⁴ Some may focus on day-to-day demands and put off succession planning due to more immediate needs.⁵⁵ Some may have a plan, but fail to put it in writing, which is often not much better than having no plan at all.⁵⁶ All attorneys, but especially sole practitioners, should have a succession plan in place; the protection such a plan would offer outweighs the burden of preparing it and warrants requiring it under state rules.

III. SUCCESSION PLANNING COULD BE IMPLEMENTED AND ENFORCED IN A UNIFORM MANNER AS EITHER AN ETHICAL OR ADMINISTRATIVE RULE

To address the issue proactively, states should implement a strictly-enforced requirement that each sole practitioner file a detailed succession plan at the time the attorney launches the sole practice, and update or affirm it in writing on an annual or biennial basis. There are different possibilities for execution of this requirement. Part A proposes succession plan implementation and enforcement as a rule of professional conduct, issued by the ABA as part of the MRPC and adopted by the states, while Part B proposes plan implementation and enforcement as an administrative rule within each state. Part C recommends uniform documentation and procedural requirements under either implementation option, while Part D proposes a procedural requirement that eases administrative burdens through the use of Successor Attorneys.

⁵³ MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. § 28 (1989).

⁵⁴ Arthur G. Greene, *Succession Planning for Solos and Small Firms*, 83 N.Y. ST. B. A'SSN J. 30, 30 (2011).

⁵⁵ *Id.*

⁵⁶ Berson, *supra* note 13.

A. The ABA Could Create an Authoritative, Stand-alone Rule Within the Model Rules of Professional Conduct, Requiring the Filing of Succession Plans by Sole Practitioners

Rather than existing as a non-authoritative comment on another rule—a comment that is not even present in eleven states—the requirement that sole practitioners file succession plans could be independently authoritative as a distinct rule. The rule should require the filing of a plan at the time that a new sole practice is initiated, and further require that the attorney file an updated plan or affirm the existing plan no less frequently than biennially. The ABA should encourage states to adopt this new model rule, and upon adoption, each state could set up an annual or biennial update requirement, perhaps in conjunction with the state's requirement for each attorney to renew his or her law license or report continuing legal education hours. Each state must also implement penalties for failure to file a succession plan; the penalties must be appropriately severe and must be enforced in order to incentivize action by the attorneys.

Succession planning is a matter of ethical concern, as evidenced by its inclusion as a comment to an existing MRPC rule. Creating a distinct rule regarding succession planning is consistent with this viewpoint that encourages and enforces ethical behavior, and would underscore the importance of the requirement itself. Related to this ethical obligation is the fiduciary duty that attorneys have to their clients; this duty further supports creating a stand-alone authoritative rule requiring succession plans.⁵⁷

An advantage to ABA creation of a model rule to require succession planning is that states would implement the requirement in a relatively consistent manner. Though individual states may not adopt the MRPC in exactly the same way, forty-nine states and Washington, D.C. have adopted the model rules in some form.⁵⁸ With a stand-alone succession planning rule, the choice of some states to adopt the MRPC without comments would no longer pose the same concern. If this trend of nearly-nationwide MRPC adoption should continue, implementation of a new succession planning rule could be relatively uniform across states, allowing practitioners to be familiar with the requirements, and easing the burden on attorneys who practice in multiple states.

A key concern raised by creating this rule lies in the enforcement mechanism. State disciplinary boards have limited time and resources, which they must first direct toward more serious ethical violations, particularly those that actively harm clients. While the lack of a proper succession plan would be an ethical violation under the authoritative new rule, the simple lack of a plan will not actively hurt clients and thus will not rise in priority until, of course, it is too late—exactly the situation that

⁵⁷ *Id.*

⁵⁸ CPR POL'Y IMPLEMENTATION COMM, *supra* note 47.

succession planning is designed to avoid. While implementation of a model rule within the ABA's MRPC has advantages, enforcement difficulties may result in a situation that mimics the current state. A requirement that is not enforced is not much better than a non-authoritative recommendation, as attorneys will still lack proper incentive to prepare a plan.

B. Each State Could Require a Sole Practitioner Succession Plan Within its Administrative Regulations

Perhaps a better option is for each state to require sole practitioner succession planning within its administrative rules. Details of these rules would mirror those proposed above, concerning an MRPC model rule: each state could require the filing of a plan at the time that a new sole practice is initiated and require that an attorney file a plan update or confirmation either annually or biennially. By implementing the rule in this manner, each state could closely tie the succession plan requirement to the state's other administrative requirements, like law license renewal or reporting of continuing legal education hours. A state could even make the succession plan update or confirmation a required precursor to law license renewal.

While implementation in this fashion may be less uniform than adoption of an ABA model rule, and may be less reflective of the ethical ideals that drive the necessity of such a plan, enforcement has the potential to be more straightforward and less costly, making succession planning more likely to occur. Simply put, if a succession plan is not updated or confirmed, an attorney could be denied license renewal. This provides an incentive to complete the requirement and negates the need to develop new sanctions for failure to file a plan, as each state could simply apply those sanctions imposed for failing to renew a license.

C. Through Either Implementation Method, Succession Plans Could Be Completed Through the Use of Uniform Documents and Required Procedures

Under either implementation method, the state rules could reflect general uniformity. State administrative regulations requiring succession planning could achieve this if the ABA promulgates a uniform document and procedure to be adopted by each state and used by each sole practitioner in establishing a succession plan.⁵⁹ The uniformity then promotes consistency between states and individuals, and allows all attorneys to gain familiarity with a single form and process.

While states may vary from the uniform document to reflect their unique jurisdictional requirements, the existence of similar plan documents between states could ease the burden for attorneys who relocate or request

⁵⁹ The content of this form document will be discussed in detail in Section IV *infra*.

assistance from an attorney in another state. Familiarity with a single basic document facilitates the attorney's ability to complete his or her own succession plan as well as review or implement another attorney's plan when the need should arise. The uniform procedure proposed both contributes to the planning process and promotes shifting the burden of review away from the state governing agencies.

D. Procedurally, Sole Practitioners Will Form Agreements with Successor Attorneys

As part of the succession planning process, the sole practitioner forms an agreement with another licensed attorney, the Successor Attorney, who agrees to step in and close the practice in the event of the sole practitioner's death, disability or incapacitation.⁶⁰ When the sole practitioner completes the succession plan form document, the plan is submitted to the Successor Attorney, who reviews and approves the document. Subsection one outlines why this practice would serve to benefit the sole practitioner, the Successor Attorney and the state. Subsection two discusses incentivizing Successor Attorneys, while subsection three addresses the potential for conflicts of interest and how they may be resolved.

⁶⁰ A publication of the Oregon State Bar Professional Liability Fund recommends forming agreements with two separate attorneys, one to serve in the Successor Attorney role and a second to serve as an Authorized Signer. The general purpose of this separation is to protect the sole practitioner who is still practicing.

It is best to choose someone other than [the] Assisting Attorney to act as the Authorized Signer on [the] trust account. This provides for checks and balances, since two people will have access to [the] records and information. It also avoids the potential for any conflicting fiduciary duties that may arise if the trust account does not balance.

BARBARA S. FISHLEDER, *PLANNING AHEAD: A GUIDE TO PROTECTING YOUR CLIENTS' INTERESTS IN THE EVENT OF YOUR DISABILITY OR DEATH* (2006). For two reasons, this article instead recommends a single Successor Attorney whose role encompasses that of the Authorized Signer. First, Oregon appears unique in recommending two separate roles, as planning guides set forth by other state bar associations recommend simply a single successor attorney. *See, e.g.,* CATHERINE M. O'CONNELL, *STATE BAR OF MICH., SUDDEN DEATH OR DISABILITY: IS YOUR PRACTICE – AND YOUR FAMILY – READY FOR THE WORST; COMM. ON LAW PRACTICE CONTINUITY*, N.Y. STATE BAR ASS'N, *PLANNING AHEAD: ESTABLISH AN ADVANCE EXIT PLAN TO PROTECT YOUR CLIENTS' INTERESTS IN THE EVENT OF YOUR DISABILITY, RETIREMENT OR DEATH* (2005). Second, attorneys who reviewed the recommendations within this article deemed separating the functions cumbersome and expressed concern at needing to find two other attorneys willing to make succession agreements; they preferred the recommended requirement of a single successor attorney.

1. The Use of Successor Attorneys Serves a Dual Purpose

Forming a relationship with a Successor Attorney and requiring that individual to review and approve of the sole practitioner's succession plan serves a dual purpose. First, it ensures that the attorney who may actually need to settle the sole practitioner's firm is aware of all necessary information and has the chance to request that the sole practitioner amend or clarify the plan details. Second, because the Successor Attorney completes this thorough plan review, the state does not need to do so, lessening the administrative burden posed by this rule.

Presumably, the Successor Attorney will want to ensure that the plan is accurate, thorough and provides enough organization and account information to facilitate implementation should the need arise. Faced with the prospect of needing to step into the sole practitioner's shoes, the Successor Attorney will look for necessary details and request guidance from the sole practitioner. Because the Successor Attorney will be assuming the responsibility of plan implementation, he is motivated to increase the plan's likelihood of success. A sole practitioner facing a short-term shutdown of his practice due to an unforeseen illness realized the benefit of a thorough succession plan, as his Successor Attorney put the plan to the test:

During my absence from the office, my [office emergency and disability] manual is getting its first real-life test. The good news is that having a manual available has been a comfort that helped the office to continue to run smoothly. Those closest to me were able to check the physical and clerical aspects of the office. Lawyers with whom I've developed a rapport for such a contingency were notified. A lawyer was able to screen both the physical and electronic calendars for appointments, court appearances, and deadlines. Rescheduling client appointments far ahead of time was appreciated. Immediately directing e-mail to auto-reply "out due to illness" worked well. Bill-pay and money-transfer functions were attended to. Having my medical contacts and information organized was helpful. I found that keeping updated with the continuing evolution of technology and proliferation of passwords to be a challenge, but overall, client confidence was maintained and opposing counsels cooperated.⁶¹

The plan implementation was largely successful, and the experience allowed the sole practitioner to address the plan's deficiencies. While a run through of this nature is likely not a realistic option for most attorneys, a

⁶¹ Cohen, *supra* note 52.

comprehensive review by the Successor Attorney and follow up with the sole practitioner can have similar plan-enhancing effects.

Because of the Successor Attorney's detailed plan review, state enforcement could be limited to simply ensuring that each sole practitioner has submitted a complete succession plan form, which includes the signature of a licensed Successor Attorney, attesting to the review and approval of the plan. An online submission and approval process could simplify the state's administrative burden even further.⁶²

2. Successor Attorneys May Willingly Enter into Reciprocity Agreements or States Could Incentivize Participation

Identifying a Successor Attorney may prove difficult for some sole practitioners.⁶³ Due to the time and effort involved in the role, other attorneys may shy away from accepting the responsibility created by accepting the position. Successor Attorneys could be motivated through the nature of their situation or through state-created incentives.

Some sole practitioners may form reciprocity agreements to each serve as the Successor Attorney for the other.⁶⁴ For instance, Shell Bleiweiss, an environmental lawyer in Chicago, formed reciprocal agreements with another sole practitioner in the same field, located in a nearby suburb.⁶⁵ Debra Bruce, who authors the blog *Raising the Bar*, recommends beginning this process early: "I think the biggest problem is for newer lawyers because they may not have the network of lawyers in their practice areas to connect with. . . . the big challenge is building the relationships to get their commitment and to build trust."⁶⁶ She recommends joining local bar associations, attending conferences to meet other lawyers who practice in the same field, networking through colleagues and classmates, and then taking the time to build relationships.⁶⁷

States may also want to consider incentivizing the role. In return for serving as a Successor Attorney, perhaps an attorney could receive credit toward the annual requirements of continuing legal education hours.⁶⁸ As an example, an initial plan review could earn two to four hours, depending on the state's plan requirements, and the review of plan updates in subsequent years could earn one to two hours. In a state like Ohio, this type of credit is

⁶² This could involve online submission by the sole practitioner, followed by online verification of review and approval by the Successor Attorney.

⁶³ Articles and bar association planning guides appear largely silent on this issue when recommending the selection of a successor attorney.

⁶⁴ Blackford, *supra* note 1, at 40–41.

⁶⁵ Kevin Davis, *Pinch Hitters: Solos Need a Backup Plan to Prepare for the Unexpected*, A.B.A. J., Jan. 2014, at 34, 34.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Conversation with J. Richard Emens, Emens & Wolper Law Office (Jan. 8, 2014).

consistent with the purpose for continuing legal education as it is stated within the Rules for the Government of the Bar: “to maintain and improve the quality of legal and judicial services in Ohio[.]”⁶⁹ Additionally, Ohio already provides continuing legal education credit for similar activities.⁷⁰ Of the twenty-four credits required biennially, lawyers may earn up to twelve credits for publishing a book or article, and up to six credits for completing pro bono work.⁷¹ Both of these activities reflect priorities that go beyond simply sitting through an educational seminar for credit, as they involve actively contributing to the legal community and society at large. If other states have similar priorities in their continuing legal education requirements, the provision of credit for serving as a Successor Attorney would fit nicely within that scheme.

A final form of motivation could come from arranging payment to the Successor Attorney in the event that the succession plan requires implementation. In Ohio, an attorney appointed to inventory files and take client protective action following another attorney’s death may be paid “reasonable fees” for his work.⁷² While each state should consider whether some of the budgetary savings that result from the use of successor attorneys could go toward compensation of those successors, the sole practitioner should also provide for payment. Rather than setting aside funds, a sole practitioner could accomplish this through a specific life insurance policy:

Friends may not expect to be paid to wind down things for you if you die or become disabled, but it is a big job. [They are] essentially going to be running two law offices for a month or two, and [they] need to make sure [they] get paid. You can take out a life insurance policy for this purpose and not have the assisting attorney have to rely upon accounts receivable.⁷³

For those who are on the edge, this compensation could provide the extra motivation needed to agree to take on a Successor Attorney role.

In the event that a sole practitioner cannot identify a successor attorney despite the incentives, the sole practitioner should still complete and file a succession plan form, submitting it along with a fee to cover the

⁶⁹ SUP. CT. RULES FOR THE GOV’T OF THE B. OF OHIO R. X (2014).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* R. V § 8(F) (2014). The Disciplinary Counsel or chair of a Certified Grievance Committee appoints the attorney in the event that no executor, partner, or other responsible party is able to assume responsibility. *Id.* The attorney receives payment upon the approval of the Secretary of the Board of Commissioners on Grievances and Discipline of the Supreme Court, and the funds used to pay the attorney come from the Attorney Registration Fund. *Id.* “Reasonable fees” is not defined. *Id.*

⁷³ Berson, *supra* note 13, at 6.

administrative cost of having the state review the plan. Perhaps states could compile lists of attorneys who are willing to take on the role as a form of pro bono work or in exchange for some of the incentives discussed. The sole practitioner's fee could also supplement the cost of the court hearing required to appoint an individual to step in and wind down the firm in the event of the sole practitioner's death, disability or incapacitation—a hearing that could otherwise be avoided through the use of a Successor Attorney.

3. *Managing Conflicts of Interest*

Some attorneys may enter into a Successor Attorney agreement in order to benefit from access to a host of potential new clients.⁷⁴ This could provide a great incentive, but it ultimately leads to two distinct conflict of interest concerns. First, if the sole practitioner is the Successor Attorney's client, the Successor Attorney may be prohibited from representing the sole practitioner's clients due to the fiduciary obligations owed to the sole practitioner.⁷⁵ Even if the Successor Attorney could represent the sole practitioner's clients, trouble could arise if he were to discover any actions by the sole practitioner that could lead to a malpractice claim: without clearly drawn lines, the Successor Attorney would have conflicting obligations between protecting the confidentiality of the sole practitioner and informing the client of the potential malpractice.⁷⁶

Second, the Successor Attorney may face conflicts of interest between the sole practitioner's clients and his own. Conflict checks can be done to avoid this, but the risk of a mistake can be high:

[Acquiring clients] does work at times . . . [h]owever, more often it turns into a quicksand of conflicts of interest that everyone is sorry they stepped into. If the assisting attorney is also going to take on representing the clients, many conflict-of-interest traps can raise their ugly heads, and often during a time the assisting attorney is grief-stricken and exhausted. He or she may be close to the ailing lawyer or recently deceased lawyer's family, and may be helping them while also dealing with the demands of the lawyer's panicked and/or grief-stricken clients and the demands of his or her own practice. These can be complicated and intense situations, and for these reasons it is best to separate representation from triage.⁷⁷

⁷⁴ See Davis, *supra* note 65.

⁷⁵ FISHLEDER, *supra* note 60, at 2.

⁷⁶ *Id.* at 7–8.

⁷⁷ Berson, *supra* note 13, at 6 (internal quotation marks omitted).

While a Successor Attorney may ultimately gain new clients through the succession plan implementation, he should be aware of the potential for conflicts and should consult his state's rules to avoid any unintended ethical violations.

IV. EACH SUCCESSION PLAN SHOULD INCLUDE ORGANIZATIONAL AND PROCEDURAL REQUIREMENTS AS WELL AS BASIC INFORMATION

The lack of a succession-planning requirement has certainly not translated to a lack of guidance within the legal community. Several states offer detailed guides to succession planning, complete with sample documents.⁷⁸ Numerous professional articles discuss the importance of planning ahead and offer personal guidance on what to address.⁷⁹ The uniform succession planning document proposed contains three parts, encompassing much of this official and personal guidance. Part A contains basic organizational requirements for office, file and account management, while Part B sets forth additional actions the sole practitioner should take; in completing the form, the sole practitioner agrees to comply with all of these guidelines. Part C contains the information that the attorney needs to convey in the succession plan to ensure a successful transition.

As proposed, the process of completing a succession plan is admittedly a cumbersome one. The sole practitioner will need to put time and thought into the information he conveys, and effort into following the organizational systems he implements. The Successor Attorney must also put appropriate time and energy into reviewing the plan and discussing any issues or questions with the sole practitioner. The burden alone is not a sufficient argument against succession planning, however, many of the rules that govern attorneys could be subject to this same accusation.

For example, MRPC Rule 1.15 provides detailed requirements regarding safekeeping client property.⁸⁰ Attorneys must maintain a separate trust account, keep complete and detailed records, preserve the records for five years after the termination of representation and render a full accounting upon request.⁸¹ States like Ohio make the Rule even more onerous by also requiring that the attorney maintain the records for seven years, along with the client fee agreement, detailed client information and all bank account statements and paperwork and further requiring a monthly reconciliation of all of these.⁸² Likewise, MRPC Rule 5.1 places a

⁷⁸ See, e.g., ATTORNEY REGISTRATION & DISCIPLINARY COMM'N, SUPREME COURT OF ILL., THE BASIC STEPS TO ETHICALLY CLOSING A LAW PRACTICE (2012); COMM. ON LAW PRACTICE CONTINUITY, *supra* note 60; FISHLEDER, *supra* note 60.

⁷⁹ See, e.g., Barber, *supra* note 24; Blackford, *supra* note 1; Beverly Michaelis, *Plan Ahead: Are You Prepared for the Unthinkable?*, 65 OR. ST. B. BULL. 29, 29 (2005).

⁸⁰ MODEL RULES OF PROF'L CONDUCT R. 1.15 (1983).

⁸¹ *Id.*

⁸² OHIO RULES OF PROF'L CONDUCT R. 1.15 (2012).

significant burden on the partners and managing attorneys within law firms to create internal oversight policies and procedures to ensure that the conduct of subordinate attorneys comports with all professional conduct rules.⁸³

The justification for these burdensome rules also justifies a detailed succession-planning requirement: protecting clients. Though the detailed succession plan proposed is time consuming, the benefit to clients outweighs the inconvenience. Additionally, once the plan is in place, annual or biennial updates should prove much simpler. While states could implement a less detailed plan requirement, doing so would likely result in plans insufficient to truly satisfy the purpose of their creation.⁸⁴ The following requirements reflect those proposed by various states to ensure that sole practitioners plan in a detailed and thorough manner.

A. Succession Planning Involves More Than Having a Written Plan; Organization Within an Attorney's Office is a Key Component

A sole practitioner must maintain an organized office such that a successor attorney could step in and find all necessary information should the need arise. The sole practitioner will convey all required details within the succession plan, and therefore needs to maintain the office in a manner that allows the Successor Attorney to use the provided details to understand the organization of the office and access all necessary information. This organization component applies to: (1) office systems; (2) client files; and (3) general access.

1. Office Systems Must be Maintained in an Organized Manner

The Successor Attorney will be at the mercy of the sole practitioner's office system organization, or lack thereof.⁸⁵ Stepping in, the Successor Attorney must be able to access and understand a number of

⁸³ MODEL RULES OF PROF'L CONDUCT R. 5.1.

⁸⁴ Berson, *supra* note 13.

⁸⁵ Lloyd D. Cohen refers to this organizational knowledge as "institutional memory":

A few decades ago lawyers were mostly surrounded by lots of staff, but now we are mostly surrounded by automation. As inefficient as staff was, it was a core of people who often knew how the office was to run when you were absent. Live staff naturally formed your firm's institutional memory — a working knowledge of the things and procedures needed to run your enterprise and serve your clients. Because that is no longer the usual situation, you need to enable the helpers coming to your aid by memorializing your institutional memory in some type of easily available form.

Cohen, *supra* note 52, at 36.

systems containing critical information.⁸⁶ This process may be easier if the sole practitioner employed a legal secretary, administrative assistant or other individual with knowledge of the office functions. It could also be eased by taking the time to review the basic information with the Successor Attorney in advance and walking him through the office to familiarize him with the organizational schemes.

In any case, the sole practitioner should prepare a procedural manual that provides extensive information to the Successor Attorney. It should include, at a minimum: detailed information about office entry and location of key items; a list of computer and account usernames and passwords; directions to use the calendar system and interpret any abbreviations or unique organizational conventions; directions to access and understand the accounting and billing records; directions to find a complete list of all client contact information for open files; directions and codes to access voicemail and forward calls; information and labeled keys to access any safety deposit boxes; and details of any special mail delivery practices.

Of equal importance, the sole practitioner must ensure in his daily practice that all systems are kept current in a manner that is understandable to the Successor Attorney. The calendar system must be updated with filing and follow-up deadlines and appointments. Client contact information must be updated as necessary. Accounting and billing records must be up to date and accurate.

2. Client Files Must be Maintained in an Organized Manner

The sole practitioner must also ensure thorough, current documentation within each client file in order to provide the Successor Attorney with the details necessary to protect the client's interests.⁸⁷ He should follow a retention and destruction policy for client files in accordance with state requirements; this policy should be detailed within the procedural manual for the Successor Attorney. The office organization system should keep open and closed client files clearly distinguishable from one another. If closed files are kept at another location, detailed information must be provided to enable access. The destruction policy should be followed carefully to prevent the assemblage of thousands of old files that the Successor Attorney would have to review.

If original documents, such as wills, deeds or contracts must be kept by the sole practitioner, they must be easily identifiable and protected, and filing cabinet keys must be available and labeled. Keeping original documents may not be in the best interest of either the client or the

⁸⁶ See, e.g., Michaelis, *supra* note 79; FISHLEDER, *supra* note 60.

⁸⁷ See, e.g., Michaelis, *supra* note 79; FISHLEDER, *supra* note 60.

Successor Attorney, however, as noted by an attorney within the Oregon State Bar's planning guide:

[I] realized that the practice of keeping original wills is an absolute nightmare for the person who ends up trying to close your practice when you die or become disabled. The person closing your practice will have to return all of the documents, and that is likely to be a difficult and expensive task. Most people move every seven years; many of those people do not think to let their lawyer/holder-of-their-original-will know their new address. As a result, your personal representative, or the person assisting with the closure of your practice, may have difficulty finding the testators . . . Lastly, and perhaps most importantly, I discovered even with all of the best intentions, keeping the original estate planning documents may actually make it difficult for your client, or the family of your client. The client may have left the area, yet the estate documents will be with you. You will have to be found, and the documents will have to be mailed. You may decide to change firms, leave the area, or stop practicing law. Any of these choices may make it difficult for your client, or your client's family members, to find you.⁸⁸

3. The Successor Attorney Must Have General Access and Protection

The sole practitioner should think through all other needs of the Successor Attorney to ease the transition. This could involve coordinating with a property owner to have an extra set of exterior keys and office keys available and labeled or coordinating with any current staff to ask if they would be willing to assist a Successor Attorney in closing down the practice if the need should arise.⁸⁹ The sole practitioner should also have all applicable insurance coverage—malpractice, workers compensation, medical, life—and ensure that all policy information is together and accessible to the Successor Attorney. Additionally, a Successor Attorney will likely want to extend the sole practitioner's malpractice insurance.

When attorneys leave private practice, their Coverage Plan limits for the year that they leave are extended to cover claims that occur after they leave private practice. This extension of coverage is called Extended Reporting Coverage (ERC) or Tail Coverage. It is available to all

⁸⁸ FISHLEDER, *supra* note 60, at 68–69.

⁸⁹ See, e.g., Jay Foonberg, *Checklist for Closing or Selling a Law Practice*, SENIORLAWYERS.ORG, <http://www.seniorlawyers.org/checklist.htm> (last visited Apr. 5, 2014).

attorneys when they leave private practice and is provided without charge . . . This coverage limit is available without a time limit on when the claim is made. The coverage limit is available even after the attorney dies.⁹⁰

A Successor Attorney implementing a succession plan should communicate with the insurance provider as soon as possible to verify any procedural requirements and ensure that this protection is available if needed.

B. The Sole Practitioner Should Take Additional Active Steps, in Addition to Office Organization, to Assist in the Implementation of the Succession Plan

In order to ensure a smooth transition, the sole practitioner should consider succession planning in everyday work, not just as a one-time exercise. This can be addressed through (1) will provisions, (2) client engagement letters and (3) bank coordination.

1. A Will Provision that Addresses the Sole Practitioner's Practice can Help Ensure Application of the Succession Plan

In some states, the sole practitioner's Successor Attorney authorization within the succession plan would terminate upon death.⁹¹ To address this, the sole practitioner could authorize a springing Power of Attorney for the Successor Attorney or a will provision could expressly authorize and direct the executor to carry out the provisions as set forth within the succession plan.⁹² States could address their jurisdiction-specific requirements when setting forth their guidelines to ensure the implementation of succession plans.

2. Client Engagement Letters Should Address the Succession Plan

Once succession plans are completed, reviewed and filed, in practice each sole practitioner should include the name of the Successor Attorney in each client engagement letter. This serves multiple purposes: it informs the clients that a plan is in place in the event of the sole practitioner's death, disability or incapacitation; it provides the clients with the name of the attorney who may contact them; and it ensures that the clients consent to the Successor Attorney reviewing the clients' files in order to notify the clients of the situation and identify any original documents that must be returned to the client.⁹³ It can also set the sole

⁹⁰ FISHLEDER, *supra* note 60, at 8.

⁹¹ *Id.* at 5.

⁹² *Id.*

⁹³ See, e.g., Blackford, *supra* note 1.

practitioner apart in the minds of clients, showing that the attorney cares enough about the clients to ensure their needs are cared for in the event that the unexpected occurs.⁹⁴ Clients would be free to retain other counsel, but this consent would allow the Successor Attorney to review files without fear of violating confidentiality requirements.

If succession plans are implemented upon the commencement of a sole practice, as proposed, this requirement is simple to fulfill. If a sole practitioner has been practicing for a number of years without including such a provision in a client engagement letter, the burden may be greater. This practitioner should use the provision in all engagement letters going forward and should also obtain consent from all active clients with a separate consent form. While this additional requirement may be onerous, the time and effort it would take for the sole practitioner to contact clients personally known to the attorney and obtain consent ahead of time is much less than that required of the Successor Attorney and the court system after the fact. This advance planning is also likely to cause less of an emotional disturbance to clients when compared to an unexpected phone call from a Successor Attorney and a lack of understanding of how their legal needs will be met and their personal documents will be handled.⁹⁵

3. *Bank Coordination*

The sole practitioner must coordinate with required bank procedures to ensure that bank and trust accounts are accessible to the Successor Attorney. The easiest way to do so is to provide the Successor Attorney with immediate access to each account. The Successor Attorney would have no trouble accessing accounts upon the sole practitioner's death, disability or incapacitation and would be able to quickly respond to client needs. The biggest concern with this option is the inability to control the Successor Attorney once access is given; a sole practitioner who opts for this access should take care to select a trustworthy Successor Attorney and should closely monitor accounts on a regular basis. Additionally, the sole practitioner should consult with their malpractice insurance provider prior to pursuing this option to verify that providing access to the Successor Attorney would not violate any of the insurer's restrictions.

⁹⁴ Berson, *supra* note 13, at 6–7.

⁹⁵ See, e.g., Maskaleris & Cooperman, *supra* note 2; Cohen, *supra* note 52, at 37.

I have found inclusion of a "continuity of care" clause in new client agreements to be great public relations. My clause says that in the event of my death, disability, or absence, a caretaker lawyer may review the client file and contact the client to see if any immediate protective action is necessary. The clause specifies that the caretaker lawyer will be acting as my agent included in the circle of confidentiality and attorney-client privilege that we are forming.

As an alternative to immediate access, the sole practitioner could sign a limited power of attorney, granting the Successor Attorney access only upon the occurrence of a specified event.⁹⁶ Specificity is important in a limited power of attorney document, as the Oregon State Bar Professional Liability Fund recommends to a sole practitioner:

If the authorization will be contingent on an event or for a limited duration, the terms must be specific and the agreement should state how to determine whether the event has taken place. For example, is the . . . [Successor Attorney] authorized to sign on your accounts only after obtaining a letter from a physician that you are disabled or incapacitated? Is it when the . . . [Successor Attorney], based on reasonable belief, says so? Is it for a specific period of time, for example, a period during which you are on vacation? You and the . . . [Successor Attorney] must review the specific terms and be comfortable with them. These same issues apply if you choose to have a family member or friend hold a general power of attorney until the event or contingency occurs. All parties need to know what to do and when to do it. Likewise, to avoid problems with the bank, the terms should be specific, and it must be easy for the bank to determine whether the terms are met.⁹⁷

It is critical to discuss these options with the bank to ensure that the document will be in compliance with bank requirements and accepted when the time arrives.

C. The Succession Plan Document Should Include All Information a Successor Attorney Would Need in Order to Protect Client Interests and Efficiently Wind Down the Sole Practitioner's Firm

The actual information conveyed within the succession plan need not include every detail. For instance, it would not require all of the information within the procedural manual, but it should specify the existence and location of the manual itself, as well as a general overview of what it contains. There are, however, some specific items that must be included within the succession plan, rather than simply referenced therein. This includes: (1) setting forth the criteria by which the Successor Attorney knows to act; and (2) determining the scope of the responsibilities given to the Successor Attorney.

⁹⁶ FISHLEDER, *supra* note 60, at 3.

⁹⁷ *Id.*

1. Determine Criteria by Which the Successor Attorney Knows When to Step in to Close or Manage the Practice

This may be a straightforward consideration in the event of a sole practitioner's death, but much more difficult when it comes to disability or incapacitation. The Successor Attorney needs to know the threshold at which they need to step in to manage or close the practice and whether this is something that they decide for themselves or for which they receive direction. The Oregon State Bar Professional Liability Fund proposes several options:

One approach is to give the [Successor Attorney] access only during a specific time period or after a specific event and to allow the [Successor Attorney] to determine whether the contingency has occurred. Another approach is to have someone else (such as a spouse, trusted friend, or family member) keep the applicable documents (such as a limited power of attorney for the [Successor Attorney]) until he or she determines that the specific event has occurred. A third approach is to provide the [Successor Attorney] with access to records and accounts at all times.⁹⁸

The decision will likely depend on a number of factors, including bank requirements, insurance requirements, family members' involvement and trust between the parties. The sole practitioner and Successor Attorney must make a determination together on which option is most suitable for their situation.

2. Determine the Scope of the Successor Attorney's Duty and the Options Available

Whether the Successor Attorney represents the interests of the sole practitioner or the interests of the sole practitioner's clients affects the attorney's actions and ethical obligations.⁹⁹ It also raises conflict of interest concerns, as discussed above.¹⁰⁰ If the Successor Attorney represents the sole practitioner when closing down the practice, he owes a fiduciary duty to the sole practitioner, he may only handle the client files to the extent necessary to refer the clients to alternate attorneys, and he would be unable to represent the clients in any claims against the sole practitioner or his estate.¹⁰¹ Conversely, if the Successor Attorney represents the sole practitioner's clients, the duty to the sole practitioner is limited, and the

⁹⁸ *Id.* at 2-3.

⁹⁹ *Id.* at 2.

¹⁰⁰ See discussion *supra* at Section III.

¹⁰¹ FISHLEDER, *supra* note 60, at 2, 9.

Successor Attorney would be obligated to reveal to the clients any malpractice or ethics violations uncovered in winding down the practice.¹⁰²

When the sole practitioner and Successor Attorney first begin discussion of the succession plan, it is critical that they clearly define the scope of the duty based on the most appropriate option in their given situation. They will both want to consider carefully the ethical and practical implications of the decision. The succession plan should include a consent form that authorizes the actions of the Successor Attorney in accordance with the scope of the duty. The sole practitioner may also want to provide the Successor Attorney with certain specific opportunities, such as purchasing or selling the practice for a fair price to be paid to the sole proprietor or his estate, in lieu of closing down the practice.¹⁰³

Succession planning is a complex and ongoing process, encompassing both the written documentation and the daily practices of the sole practitioner. Creating consistency within these documents and procedures will lead to a more successful transition upon the death, disability or incapacitation of a sole practitioner. The effort by a sole practitioner to create a detailed and thoughtful succession plan at the beginning of a practice will ultimately ease the burden on clients, family members and the Successor Attorney. State requirement of succession planning for sole practitioners will underscore its importance and incentivize action.

V. CONCLUSION

Currently, the ABA Model Rules of Professional Conduct and some state bar associations have set forth succession planning recommendations, but not requirements. These recommendations are insufficient to address the incidence of lack of planning, as they are not authoritative and do not result in sanctions until it is too late for the sanctions to have any value. States should therefore require sole practitioners to file succession planning documents and then verify on at least a biennial basis that the plan is still viable. This could be done through state administrative regulations, in conjunction with licensure renewal, in a manner that reduces the administrative burden on the state. The succession plan itself should be quite detailed, encompassing office organization, access to systems, and specific guidance and direction such that a Successor Attorney could efficiently close a sole practitioner's practice. While creating a succession plan may require significant initial effort on the part of a sole practitioner, each update or verification should be straightforward.

¹⁰² *Id.* at 7.

¹⁰³ The Model Rule of Professional Conduct Rule 1.17 addresses sale of a practice. A sole practitioner and Successor Attorney should consult their state's version of this rule if they decide to pursue this opportunity as part of their agreement. MODEL RULES OF PROF'L CONDUCT R. 1.17.

Ultimately, the effort is both necessary and worthwhile to protect clients, family members and others in the legal community.